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Kok Weng Tuck (practising under the name and style of 'David Kok & Partners') & Ors v AmBank (M) Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-1613–09 OF 2014
ALIZATUL KHAIR, TENGKU MAIMUN AND ABANG ISKANDAR JJCA
C 3 MARCH 2016

Legal Profession — Duty of care — Negligence — Appellants, legal firm acted on behalf of respondent for loan transaction — Respondent released loan monies to fourth defendant based on appellants' advice — Fourth defendant was not beneficial owner of property — Whether respondent suffered loss — Whether appellants failed to discharge its duty of care to respondent — Whether appellants committed negligence against respondent

D

E *Tort — Negligence — Contributory negligence — Appellants, legal firm acted on behalf of respondent for loan transaction — Respondent released loan monies to fourth defendant based on appellants' advice — Fourth defendant was not beneficial owner of property — Whether respondent suffered loss — Whether respondent committed contributory negligence*

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The appellants were the partners in a law firm known as 'David Kok & Partners' ('the law firm') which acted on behalf of the respondent in a loan transaction involving a transfer of property located in Seri Kembangan, Selangor ('the property') allegedly owned by one Noor Azizi bin Shahnoor, the
G fourth defendant in the court below ('the fourth defendant') to the respondent's client, one Loh Yoke Pah. In liaising with the developer of the property, the third appellant had hired a dispatch clerk who was introduced by the fourth defendant. Problem arose when the respondent found that the fourth defendant was a fraudster and not the beneficial owner of the property.
H To make the matter worse, the respondent had released the loan monies to the fourth defendant based on the advice of the law firm. It must be noted that vide cl 15 of the law firm's letter of advice, the appellants had given the respondent a guarantee to the effect that should the respondent suffer any loss as a result of it having acted on the verifications obtained by the appellants, the respondent
I would be fully indemnified by the said law firm. Consequently, the respondent brought an action against the appellants to claim damages for alleged negligence and breach of contract by the appellants. The learned High Court judge had partly allowed the respondent's claim against the appellants on a 70% liability for negligence and His Lordship had assigned a 30% liability

against the respondent for contributory negligence in approving the loan application by Loh Yoke Poh, hence the present appeal. The respondent also had filed a cross-appeal against the decision of the learned judge in assigning 30% liability against them for contributory negligence. The issues for consideration were: (a) whether the learned trial judge was correct when he found negligence and/or breach of contract committed by the law firm; (b) whether the learned trial judge was correct when he assigned 30% liability against the respondent for contributory negligent; and (c) whether the respondent was guilty of contributing to its own injury or loss that it had suffered when it released the loan monies to the fourth defendant.

Held, dismissing the appellants' appeal and allowing the respondent's cross-appeal with costs of RM30,000:

(1) Based on the evidence, the third appellant did not follow-up with a telephone call to the developer to ensure that the developer of the property, did in fact receive the correspondence handled by the freelance dispatch clerk. Thus, the law firm had failed in the discharge of its duty of care owed to the respondent in ensuring that the information required by the respondent was obtained by liaising with the developer properly and truly. As a result, the respondent had suffered loss arising out of a direct breach, by the law firm which was reasonably foreseeable. Therefore, the law firm was liable for negligence. Further, the law firm had breached its contractual obligation by failing to liaise directly with the developer in its verification duty as spelt out in the mandate given by the respondent (see paras 20–22).

(2) Applying the principle of 'But for test' to the factual matrix of the case, the approval by the respondent of the loan application by Loh Yoke Pah did not contribute to the loss that was suffered by the bank. It was the 'false' assurance of security to release the loan that had triggered an event that had led to the loss being suffered by the respondent. As such, but for the negligence of the law firm, the respondent would not have suffered the loss that it had suffered. The negligence attributable to the law firm must be total, namely 100% liable for the loss suffered by the respondent and there was no incidence of any contributory negligence having been committed by the respondent (see paras 35–37).

[Bahasa Malaysia summary

Perayu-perayu ialah rakan kongsi dalam firm guaman dikenali sebagai 'David Kok & Partners' ('firma guaman') yang bertindak bagi pihak responden dalam transaksi pinjaman melibatkan pemindahan hartanah yang terletak di Seri Kembangan, Selangor ('hartanah tersebut') yang dikatakan dimiliki oleh Noor Azizi bin Shahnoor, defendan keempat di mahkamah bawahan ('defendan keempat') kepada anak guam responden, Loh Yoke Pah. Dalam berhubung dengan pemaju hartanah tersebut, perayu ketiga telah mengupah kerani

penghantar surat yang diperkenalkan oleh defendan keempat. Masalah timbul apabila responden mendapati bahawa defendan keempat seorang penipu dan bukan pemilik benefisiari hartanah tersebut. Untuk membuat keadaan lebih buruk, responden telah melepaskan wang pinjaman kepada defendan keempat berdasarkan nasihat firma guaman tersebut. Ia perlu ditekankan bahawa melalui fasal 15 kepada surat nasihat firma guaman tersebut, perayu-perayu telah memberikan responden jaminan yang bermaksud bahawa jika responden mengalami apa-apa kerugian akibat daripada ia bertindak atas pengesahan yang diperoleh oleh perayu-perayu, responden akan ditanggung rugi sepenuhnya oleh firma guaman tersebut. Berikutan itu, responden telah memulakan tindakan terhadap perayu-perayu untuk menuntut ganti rugi kerana kecuaian dan pelanggaran kontrak yang dikatakan oleh perayu-perayu. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan sebahagian daripada tuntutan responden terhadap perayu-perayu berdasarkan 70% liabiliti kerana kecuaian dan Yang Arif telah memberikan 30% liabiliti terhadap responden kerana kecuaian yang disumbangi dalam meluluskan permohonan pinjaman oleh Loh Yoke Poh, justeru rayuan ini. Responden juga telah memfailkan rayuan balas terhadap keputusan hakim yang bijaksana dalam memberikan 30% liabiliti terhadap mereka kerana kecuaian yang disumbangi. Isu-isu untuk ditentukan adalah: (a) sama ada hakim perbicaraan yang bijaksana adalah betul apabila beliau mendapati kecuaian dan/atau pelanggaran kontrak dilakukan oeh firma guaman tersebut; (b) sama ada hakim perbicaraan yang bijaksana adalah betul apabila beliau memberikan 30% liabiliti terhadap responden kerana kecuaian yang disumbangi; dan (c) sama ada responden bersalah kerana menyebabkan kecederaan atau kehilangannya sendiri yang dialaminya apabila ia melepaskan wang pinjaman itu kepada defendan keempat.

Diputuskan, menolak rayuan perayu-perayu dan membenarkan rayuan balas responden dengan kos RM30,000:

(1) Berdasarkan keterangan, perayu ketiga tidak membuat susulan dengan panggilan telefon kepada pemaju bagi memastikan bahawa pemaju hartanah tersebut memang telah menerima surat-menyurat yang dikendalikan oleh kerani penghantar surat. Oleh itu, firma guaman telah gagal dalam melaksanakan kewajipan berjaga-jaganya kepada responden dalam memastikan maklumat yang dikehendaki oleh responden telah diperoleh dengan berhubung dengan pemaju sewajar dan sebenarnya. Akibat itu, responden telah mengalami kerugian akibat pelanggaran secara langsung itu, oleh firma guaman tersebut yang boleh dijangkakan secara munasabah. Oleh itu, firma guaman tersebut adalah bertanggungjawab untuk kecuaian. Selanjutnya, firma guaman telah melanggar tanggungjawab kontraktualnya kerana gagal menghubungi secara langsung dengan pemaju dalam tugas pengesahannya seperti yang

dinyatakan dalam mandat yang diberikan oleh responden (lihat perenggan 20–22).

(2) Dengan menggunapakai prinsip 'But for test' kepada matriks faktual kes ini, kelulusan oleh responden berhubung permohonan pinjaman oleh Loh Yoke Pah tidak menyumbang kepada kerugian yang dialami oleh bank tersebut. Ia adalah jaminan 'false' berhubung sekuriti untuk melepaskan pinjaman yang telah mencetus kejadian yang telah membawa kepada kerugian yang dialami oleh responden. Oleh itu, jika bukan kerana kecuaian firma guaman tersebut, responden tidak mungkin mengalami kerugian yang dialaminya. Kecuaian yang menyumbang kepada firma guaman tersebut mestilah secara menyeluruh, iaitu 100% bertanggungjawab kerana kerugian yang dialami oleh responden dan tidak terdapat kejadian apa-apa kecuaian yang disumbangi yang telah dilakukan oeh responden (lihat perenggan 35–37).]

Notes

For cases on contributory negligence, see 12(1) *Mallals Digest* (5th Ed, 2015) paras 1263–1333.

For cases on negligence, see 9(2) *Mallals Digest* (5th Ed, 2015) paras 1591–1604.

Cases referred to

Anthony Ting Chio Pang v Wong Bing Seng & Anor [1997] 2 CLJ 831 (refd)

Barnette v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428, QBD (refd)

Chester v Afshar [2004] 3 WLR 927, HL (refd)

Lai Foh & Sons Sdn Bhd v Skrine & Co (didakwa sebagai sebuah firma) [2001] MLJU 250; [2001] 3 CLJ 185, HC (refd)

Lim Soh Wah v Wong Sin Chong [2001] 2 CLJ 344, CA (refd)

Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, ChD (refd)

R v White [1908-10] All ER Rep 340, CA (refd)

Yong & Co v Wee Hood Teck Development Corporation [1984] 2 MLJ 39, FC (refd)

Legislation referred to

Contracts Act 1950 s 24

Appeal from: Civil Suit No 22NCVC-788–06 of 2012 (High Court, Shah Alam)

Ranjit Singh (Adeline Yew with him) (Ranjit Singh & Yeoh) for the appellants.
Porres P Royan (Yap Jyy Huey with him) (Shook Lin & Bok) for the respondent.

Abang Iskandar JCA:

BRIEF FACTS OF THE CASE

[1] On 31 January 2007, the developer of Bandar Putra Permai ('the developer') entered into a sale and purchase agreement for the sale and purchase of a three storey shop lot known as No A-8-1, A-8-2 Block A, Putra Walk, Jalan PP25, Taman Pinggiran, Bandar Putra Permai, Seksyen 2, 43300 Seri Kembangan, Selangor ('the property') with one Tek Hin Auto Sdn Bhd ('the true beneficial owner'). At all material times, there was no issue document of title issued in respect of the property and any sale in respect thereof would necessarily be by way of assignment as consented to by the developer.

[2] The true beneficial owner of the property did not at any time sell or enter into any agreement to sell the property to any other party.

[3] By a letter dated 20 October 2010 ('the bank's letter of offer') to Loh Yoke Pah ('the purchaser'), AmBank (M) Bhd ('the bank') had offered a loan facility of RM680,000 to part-finance the purchase of the property on the terms and conditions as contained therein.

[4] By a letter dated 27 October 2010, the bank instructed a law firm Messrs David Kok & Partners ('the law firm') to act on the bank's behalf in the security documentation with regard to the facility of RM680,000 to be granted to Loh Yoke Pah.

[5] Mr Christopher Paul a/l Aisu ('the third defendant'), who was a partner in the law firm, had attended to this brief from the bank and acted for the bank in various actions such as to confirm for the bank the correctness of all particulars in the documents, seeking written confirmation in respect of the property with the developer, and to prepare all the required legal documentation.

[6] On 15 December 2010, the bank received the law firm's letter of advice dated 14 December 2010 ('letter of advice') which contained, among others, the developer's undertaking to obtain the consent to transfer the property, and confirmed that Mr Noor Azizi bin Shahnoor ('the fourth defendant') was the beneficial owner of the property which had been paid in full and the law firm to furnish the notice of assignment by the fourth defendant duly acknowledged by the developer.

[7] The letter of advice also contained para 15 which reads:

> In the event that the legal documentation is not in order and is incomplete and should you as the financier suffer any loss or damage by reason of the security documents not being registered for reason attributable to our acts of negligence, error or mistake or omission and/or by reason of the aforesaid security documentation not being in order, ourselves as the solicitors responsible for the preparation of the said legal documentation shall be responsible to make good to you in full all such loss and damage.

[8] Based on the letter of advice from the law firm, the bank had issued a cheque in the sum of RM680,000 for payment in favour of the fourth defendant and delivered the same cheque to the law firm. The cheque was subsequently cleared and the said amount was debited from the bank's account.

[9] On 28 December 2011, the bank received a letter dated 19 December 2011 from the law firm wherein it was stated that the developer did not recognise the fourth defendant as the assignor of the property. The implication was dire to the bank, and consequently, the bank had thus filed this suit against the defendants.

[10] In this suit, it was contended by the bank, being the plaintiff, that the underlying transaction of the loan facility, ie the purported sale, was a sham, unsustainable, immoral, and or unlawful pursuant to s 24 of the Contracts Act 1950. The plaintiff alleged that the said law firm had breached the terms of engagement/appointment, fiduciary duty to the plaintiff and acted negligently pertaining to the legal documentation for the loan facility.

[11] The plaintiff in this suit had therefore claimed for, inter alia, a declaration that the facility agreement dated 29 November 2010 and the deed of assignment (by way of security) dated 29 November 2010 was void, and it had also claimed for special damages amounting to RM720,332.89.

[12] The learned High Court judge on 25 August 2014 had *partly* allowed the plaintiff's claim against the first, second, and third defendants on a 70% liability for negligence and he had assigned a 30% liability against the plaintiff for contributory negligence in approving the loan application by Loh Yoke Poh. A judgment in default was entered against the fourth defendant. Thus this appeal by the first, second, and third defendants before us. The plaintiff, on the other hand, filed a 'Notis Rayuan Balas' dated 23 October 2014, whereby it had appealed against the finding of the learned trial judge that it was contributorily negligent to the tune of 30%, as can be seen in the supplementary appeal record (2).

A THE APPEAL

[13] Essentially, the plaintiff's case against the defendants was one that was premised upon the acts of the defendants in issuing the letter of advice to the plaintiff and which document was subsequently acted upon by the plaintiff to its detriment whereby it had suffered losses as a result thereof. As a result of the advice in the said letter of advice from the said law firm, the plaintiff had released the loan facility to the fourth defendant who in the factual matrix, turned out to be a person who was not entitled to the payment of the loan facility. It was the plaintiff's case that the defendants had breached their contractual obligation in the performance of the mandate given by the plaintiff to verify the crucial particulars pertaining to the property from the developer, so as to enable the plaintiff to make an informed decision on whether to release the loan facility. The defendants had given the plaintiff a guarantee to the effect that should the plaintiff suffer any loss as a result of it having acted on the verifications obtained by the defendants, the plaintiff would be fully indemnified by the said law firm. That was essentially the stipulation under cl 15 of the letter of advice. The plaintiff had also premised its action on the tort of negligence in that the defendants had failed in discharging the duty of care owed to the plaintiff when the said law firm gave the plaintiff false, untrue or inaccurate particulars that it had purportedly obtained from the developer, in the discharge of its mandate, in the letter of advice. It was the pleaded case of the plaintiff that having been so advised by its solicitor ('the said law firm') the plaintiff had released the loan sum amounting to RM680,000 to the fourth defendant on the basis that he was the beneficial owner of the property who had sold the same property to the plaintiff's customer, one Loh Yoke Pah.

[14] As it had panned out, it was subsequently discovered that the fourth defendant was not the beneficial owner of the subject property, but by then it was too late, the proverbial horse had bolted, leaving the bank languishing and saddled, as it were, with the loss as a result thereof, as there was no valid security to fall onto in the circumstances. The fourth defendant had turned out to be a fraudster, and although judgement in default had been entered against him, it remained only a useless paper judgement of no value to the plaintiff at all. The plaintiff's remedy had therefore resided in a successful action against the said law firm.

[15] The main pertinent issue that needed to be considered by us was whether the learned trial judge was correct when he found negligence and/or breach of contract having been by committed by the law firm.

[16] Learned counsel for the appellant law firm had submitted before us that his client was not negligent nor had his client breached the contract which had required the law firm to obtain verification and confirmation on the particulars

pertaining to the relevant status of the various items on the property. It was the express instruction in the mandate given to the law firm by the plaintiff that the verification and confirmation had to be done *directly* with the developer. It was submitted on behalf of the law firm that what it had done in the discharge of that mandate was proper and that the standard of care required of the law firm had not been compromised, let alone breaching it. It was contended by the law firm that it was not liable in contract nor in the tort of negligence. If at all negligence was established, it was learned counsel's contention that the law firm, may be liable for only up to 10%–20%, at the highest.

[17] For this, we had looked at the facts as established by the evidence. That task was made considerably lighter on account of the numerous findings of facts as found by the learned trial judge. The learned trial judge found, inter alia, that:

(a) the said law firm had been corresponding with a bogus developer as the actual developer had never received the letters written by the said law firm;

(b) according to the actual developer's records, the fourth defendant had no capacity to transfer the property to Loh Yoke Poh or anyone else;

(c) the third defendant who was the solicitor in charge of the matter, employed a freelance dispatch clerk, introduced to him by the fourth defendant, to do the liaising with the developer;

(d) the letters of confirmation and consent issued by the purported developer did not emanate from the actual developer and are not worth the piece of paper they were written on;

(e) the letters at 6RR 873/2CCBD 463–467, purportedly from the developer to the said law firm, were never issued by the developer who have no record of this transaction;

(f) the fourth defendant was never the beneficial owner of the said property to enable him to sell to Loh Yoke Pah who had obtained loan facilities from the bank which were supposed to be secured;

(g) the said law firm *never* liaised with the developer *directly*;

(h) the third defendant was the attending solicitor for the transaction where the fourth defendant purportedly sold the property to Loh Yoke Pah;

(i) if due care and attention had been exercised at that stage, it would have been discovered that the property was never purchased by the fourth defendant;

(j) the SPA entered into between the fourth defendant and Loh Yoke Pah was prepared by the said law firm;

(k) at that stage, the said law firm should have been able by due diligence to ascertain the position of the fourth defendant; and

(l) when the said law firm advised the bank to release the loan sum to Loh Yoke Pah, they had breached their duty to the bank.

[18] When the law firm agreed to take on this task for the plaintiff to verify the crucial particulars pertaining to the status of the property, the law firm had even stipulated, in the letter of advice which itself issued, as appeared in cl 15 therein, that the law firm would indemnify the plaintiff in full, should the plaintiff suffer any loss as a result of it acting on the advice given by the law firm pertaining to the status of the property. It knew fully that the plaintiff had needed the confirmation on the status of the property so that the plaintiff could make an informed decision whether to release the loan to the fourth defendant, the purported vendor of the property, from whom the purchaser Loh Yoke Pah had intended to purchase the property.

[19] That stipulation was akin to an undertaking or a guarantee to the plaintiff that it was safe to release the loan monies to the fourth defendant. To the plaintiff, that stipulation meant that the loan monies that were to be released to the fourth defendant would be secured against the property. To be able to hold out to the plaintiff in such a manner, the law firm must be very sure and certain in its belief as to the status of the vendor of the property. It must have checked that fact properly and was confident in the information it received pertaining to the confirmation that it needed to advise the plaintiff with. The plaintiff had instructed that this be done by the law firm by checking with the developer directly. The specific requirement was that the law firm was to 'liase *directly* with the developer for the necessary confirmations and consents ...'. The law firm said that it had done so. In the letter of advice, the law firm stated that 'the Developer's undertaking to obtain the Consent obtained'.

[20] Let us look at the facts relating to how the law firm had purportedly discharged its obligation arising from the mandate given to it by the plaintiff. The starting point would be to look at the evidence of the third defendant, Christopher Paul a/l Aisu, the solicitor in the law firm who had attended to this matter at the law firm's office. In order to carry out the said task, the third defendant had employed a freelance dispatch clerk. This dispatch clerk was introduced to Christopher by the purported vendor in order to do the liaising with the developer. This finding, as made by the learned trial judge was impeccable. It was beyond any dispute. When asked by this court during submissions whether this was standard procedure or practice followed by legal firms, learned counsel was frank enough to answer that question in the negative. To make matters worse, Christopher did not make any record pertaining to this freelance dispatch clerk who he had appointed to carry out a

very important task of ensuring that the correspondences relayed to the developer would actually reach the intended addressee. As such there was no way of tracing this freelance dispatch clerk. On top of that, Christopher did not follow-up with a telephone call to the developer to ensure that the developer of the Bandar Putra Permai housing project, did in fact receive the correspondence handled by the freelance dispatch clerk. Learned counsel had argued before us that there was no duty on the part of the law firm to make any call to the developer. Such was not the practice, so it was contended before us.

[21] With respect, if the dispatch clerk had been a member of staff of the law firm, there would be no duty to take the extra step, as a necessary precaution, of calling the developer, with a view to confirm whether the latter had received the necessary document from the law firm. But in the given scenario above-described, we were of the considered opinion that the law firm had failed in the discharge of its duty of care owed to the plaintiff in ensuring that the information required by the plaintiff was obtained by liaising with the developer properly and truly. By doing what it had done, the law firm had engaged in a mode that was wrought with risks that the real developer might not have received that correspondence from the freelance dispatch clerk. Indeed, the unthinkable and dreaded thing had happened against which no safeguards were put in place or undertaken by the law firm. The facts had shown that the information that was obtained from the developer and which information was used as the basis for the law firm's letter of advice to the plaintiff, had in fact emanated not from the developer, but from a bogus party. It turned out that the documents or correspondence meant for the real developer had been hijacked by colluding parties associated with the fourth defendant and in a purported reply to the queries posed in the correspondence from the law firm false information had been supplied by the rogues, masquerading as the developer. The law firm had subsequently, without checking with the developer acted on the information supplied. As a result, the plaintiff had suffered loss arising out of a direct breach, by the law firm which was reasonably foreseeable. We therefore agree with learned counsel for the plaintiff that the law firm was liable for negligence.

[22] We were also of the view that the law firm had breached its contractual obligation by failing to liaise *directly* with the developer in its verification duty as spelt out in the mandate given by the plaintiff.

[23] In the course of submissions before us, it was argued by learned counsel for the law firm that it should not be held liable for the acts of the freelance dispatch clerk. With respect, we were of the view that a short answer to that could be found in the case cited by learned counsel in reply, namely the case of *Lai Foh & Sons Sdn Bhd v Skrine & Co (didakwa sebagai sebuah firma)* [2001] MLJU 250; [2001] 3 CLJ 185. Indeed, that case was instructive especially for

conveyancing practitioners. At p 191 of the report, it was said:

> He was involved in conveyancing and corporate law practice. He was aware that the practice of conveyancing work encompassed certain rules of etiquette and required a high degree of skill and caution on the part of the solicitors for the purpose of protecting the client's interest. He knew that a solicitor would be liable for what he undertook when giving a solicitor's undertaking, contracting parties and other solicitors placed very high regard to an undertaking given by a solicitor and that a breach of a solicitor's undertaking was a serious matter as it could affect his client's interest. He was also aware that the National Land Code made provisions for instances of fraud and forgery and that it was prudent for conveyancing solicitors to protect their clients' interest against possible fraud or forgery. He released the land titles to Chung on the purported letter of authorisation which he had no reason to suspect that it was forged because he knew that Lai Foh (the plaintiff's alter ego) and Chung were in negotiations on the joint-venture agreement which was produced to him by Chung still in draft form. Before releasing the land titles to Chung on the purported letter of authorisation which he had no reason to suspect that it was forged he did not verify with Messrs Shook Lin & Bok whether the plaintiff had discharged its obligation to TLY under the undertaking because Chung told him that the monies would be settled once the joint-venture agreement was signed. After the land titles had been released to Chung, he did not write to inform the plaintiff about it due to an oversight. He did not send to the plaintiff a copy of his first letter to Chung requesting for the return of the land titles because he did not bother to do so, although he knew that in conveyancing matters it is the practice to send a copy of his correspondence to the client in order to keep the client informed. He did not do anything to get back the land titles from Chung and he did not inform the plaintiff about the release of the land titles to Chung between 18 November 1983 and 1 April 1984 because he assumed that Lai Foh knew that the land titles were with Chung and that had the joint venture agreement not been executed the land titles ought to be returned to him. Subsequent to 18 November 1983 he did not advise Lai Foh to lodge a caveat on the lands but did so only when Lai Foh came to see him on 1 April 1984.

[24] Further, at p 194 of the reported case of *Lai Foh & Sons Sdn Bhd* the learned judge had gone on to state categorically to the following effect:

> If solicitors can be absolved of all liabilities because they cannot be said to be able to foresee that a third party will commit fraud or forgery as a result of the solicitor negligently handing over land titles to a third party, then the retainer of a solicitor to handle a conveyancing matter would serve no useful purpose, as members of public would be better off handling their conveyancing transactions by themselves.

[25] In the case of *Anthony Ting Chio Pang v Wong Bing Seng & Anor* [1997] 2 CLJ 831 it was held that the solicitors were negligent in failing to properly ascertain the true identity of the person who claimed to be the owner of the land and held the said solicitors to be negligent. In fact, it has been held that, at common law, in relation to a solicitor's liability in tort to his client, his liability may be viewed from two aspects. The case of *Midland Bank Trust Co*

Ltd and another v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571 which laid down that proposition was followed by our Federal Court in the case of *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, where it was stated as follows at p 45: A

> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort (see *Halsbury's Laws of England*, (3rd Ed) Vol 36 p 96, para 131). *He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do (Midland Bank Trust Co Ltd).* B C

[26] The next question that needed to be answered was whether the learned trial judge was correct, when he found, as a matter of fact and law, that the plaintiff was 30% contributorily negligent when it incurred the said loss. D

[27] This issue of contributory negligence that was assigned to the plaintiff by the learned trial judge was the subject of the cross-appeal by the plaintiff. Contributory negligence is negligent conduct by the injured party that is a contributing cause of his or her injuries, and which conduct falls below the legal standard for protecting oneself from an unreasonable risk of harm. In law, the plaintiff has the burden to prove that he or she is not contributorily negligent. This is so because it is his case that the defendant has been *wholly* negligent. E F

[28] In determining whether there was negligence, the court would have to look at the causation factor in the transaction. What was the causative factor that had caused the plaintiff to have suffered the alleged loss? If that cause could rightly be attributable to the act or omission on the part of the defendant, then liability ought to be assigned to the defendant. If he was the only cause of the plaintiff's loss, then his liability must be found to be 100%. But if there was contributory negligence, then an apportionment of liability must ensue based on the degree of blameworthiness of the contributing parties based on their culpable acts in so far as they can be quantified. G H

[29] Having considered the evidence and the records of appeal, we were of the view that the learned trial judge was correct when he found that the plaintiff was reckless when it approved the loan application by Loh Yoke Pah when in fact, their data system had contained adverse particulars pertaining to Loh's creditworthiness which, upon an objective assessment would not have entitled him to get a favourable treatment by the plaintiff, in so far as the loan application was concerned. We were of the view that there existed sufficient I

evidence before the learned trial judge to support his finding against the plaintiff in the manner in which it had approved Loh's loan application. But having said that, the pertinent question had become, whether the plaintiff, in the circumstances of this case, taken as a whole, was guilty of contributing to its own injury or loss that it had suffered when it released the loan monies to the fourth defendant.

[30] It was on this score that we found that the learned trial judge was in error when he found that the bank had contributed to its own loss on account of the reason as advanced by the learned trial judge in his grounds of judgment. After evaluating the evidence led before him, the learned trial judge had made the following findings: (a) that the plaintiff was guilty of contributory negligence in the manner in which the procedure for granting the loan to Loh Yoke Pah was adopted by the bank; (b) that Loh Yoke Pah would not have been granted the loan if the plaintiff had been prudent and all the necessary checks and safeguards had been put in place; and (c) that the bank's loss would not have occurred but for the granting of the loan to Loh Yoke Pah.

[31] In doing so, he had applied the 'but for test' against the bank. We now would reproduce that portion of his grounds of judgment:

> In my judgment the plaintiff is contributory negligent in the manner in which the procedure for granting the loan to Loh Yoke Pah was adopted by the plaintiff. Had the plaintiff been prudent and all necessary checks and safeguards been put in place, Loh Yoke Pah would have never been granted the loan. It follows but for the granting of loan to Loh Yoke Pah, the loss befalling to the plaintiff would not have occurred.

[32] Perhaps, it is now pertinent to revisit briefly, this concept commonly known as the 'But for test' and what it entails. In the case of *Barnette v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, the facts are as follows: Mr Barnett went to hospital complaining of severe stomach pains and vomiting. He was seen by a nurse who telephoned the doctor on duty. The doctor told her to send him home and contact his GP in the morning. Mr Barnett died five hours later from arsenic poisoning. Had the doctor examined Mr Barnett at the time there would have been nothing the doctor could have done to save him. It was held that the hospital was not liable as the doctor's failure to examine the patient did not cause his death. The 'But for test' was applied, namely, would the result have occurred but for the act or omission of the defendant? If yes, the defendant is liable. This principle is similarly applicable to determine causation in criminal cases. An example to illustrate such an application is the case of *R v White* [1908-10] All ER Rep 340 (CA) where the accused person was charged for the murder of his mother. He was accused of killing her by way of poisoning her night drink with cyanide. Her mother did take the drink prepared by the accused person. As a matter of

fact, the mother did in fact die, and thus the arraignment against the accused person for the murder of his mother. At the end of the trial, the accused person was acquitted of the murder charge, but was instead found guilty of attempted murder. The appeal by the Crown to the Court of Appeal against that verdict was dismissed. The rationale behind that verdict had been that the mother had died, not because of the cyanide poisoning but that she had died because of a heart attack. The impugned act of the accused must be the operating and substantial cause of the death that had occurred. In *White*'s case that operative and substantial cause of death was the heart attack.

[33] In the English House of Lords' case of *Chester v Afshar* [2004] 3 WLR 927 the claimant had suffered back pain for six years. This became quite severe and at times she was unable to walk or control her bladder. An MRI scan revealed that there was disc protrusion into her spinal column and she was advised to have surgery. The surgery carried a 1–2% risk that even if it was performed without negligence the operation could worsen rather than improve her condition. Her consultant neurosurgeon Mr Afshar was under a duty to warn her of this risk although he failed to do so. The claimant had the operation and unfortunately it worsened her condition. The trial judge found that the surgeon had not been negligent in performing the operation but his failure to warn her of the risk was a breach of duty. The claimant argued that if she had been warned she would not have taken the decision to have the operation straight away but would have taken time to consider other options and discuss the risks with her family and would thus not have had the surgery on the day which she did have it. She did not say she would never have had the operation. The judge held that if she had the operation on another occasion it may have been successful. He therefore found for the claimant. The defendant appealed. The Court of Appeal dismissed the appeal and the defendant appealed to the House of Lords on the grounds of causation in that she was likely to have consented to the operation and that even if it had been on a different occasion it carried the same risk. The English apex court dismissed the appeal and Lord Hope, had occasion to say this:

> To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would find that result unacceptable. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case. *The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that*

it can be regarded as having been caused, in the legal sense, by the breach of that duty. (Emphasis added.)

[34] In the case immediately before, we noted that the learned trial judge had applied the 'But for test' against the plaintiff. He, however, did not apply the same test against the said law firm, being the defendants before him. In determining causation in negligence between the impugned conduct of the law firm and the loss or damage or injury suffered by the plaintiff, this 'But for test' would be a most relevant tool to be employed in order to eliminate possible causes of the plaintiff's loss. The question that ought to be asked must necessarily be: 'But for the impugned act of the defendant, would the plaintiff have suffered the losses that it did?' The answer to that question would be very telling indeed. If the defendant's impugned act was responsible for the plaintiff's incurred loss, then was there any act attributable to the plaintiff itself that had contributed to that loss as well. That would be the postulation of the issue before the court.

[35] Applying the principle above-mentioned, to the factual matrix of this case (as was found by the learned trial judge) it was our respectful view that the approval by the plaintiff of the loan application by Loh Yoke Pah did not contribute to the loss that was suffered by the bank. To a postulated question: 'But for the approval of the loan, would the bank have suffered the loss that it did?'. The learned judge had answered that in the affirmative, thereby assigning a 30% liability for contributory negligence against the plaintiff. But, we were of the considered view that the approval of the loan application by the plaintiff to Loh Yoke Pah was irrelevant to the loss suffered by the plaintiff. This was because, the loan facility was only disbursed or released by the plaintiff to the fourth defendant upon the assurance by the law firm that the interest of the plaintiff, that is the loan was sufficiently secured. That had given the plaintiff the needed comfort in that the loan was secured by the property, thereby entitling the plaintiff to release the loan monies to the fourth defendant. Had the said law firm carried out the mandate given to it by the bank to get the necessary confirmation and verification on the status of the various aspects of the subject property from the developer *directly*, the said law firm would have forwarded the accurate particulars that were being sought by the plaintiff for it to decide accordingly pertaining to the loan application by Loh Yoke Pah. So, clearly, but for the letter of advice from the law firm, the plaintiff would not have released the loan monies. Indeed the prior approval of the loan to Loh Yoke Pah would not have been materialised with the release of the loan monies to the fourth defendant. Simply put, the letter of advice from the law firm to the plaintiff and which was acted upon by the plaintiff with dire consequences had effectively rendered the event of the prior approval by the plaintiff of Loh's loan application, to a mere footnote of no significance. In this regard, we would respectfully agree with the submissions by learned counsel for the plaintiff

when he said in his written submissions, at para 17 to the following effects: A

> 17. If the said law firm had liaised directly with the developer, as they were instructed to but did not, the developer would have informed that, according to the developer's records, the true beneficial owner of the property at the material time was Tek Hin Auto Sdn Bhd and not the fourth defendant. Undoubtedly the said law firm would have advised the bank of the facts and the loan would not have been disbursed. The 'gross recklessness' of the bank in approving the loan would not have resulted in any loss to the bank. B

[36] It was the 'false' assurance of security to release the loan that had triggered an event that had led to the loss being suffered by the plaintiff. C Without that assurance coming from the law firm, the plaintiff would not have released the loan monies, in which case, the prior approval of the loan application to Loh Yoke Pah, tainted though it may be, would not have counted for much, if anything at all, in the circumstances. As such, there was D no incidence of any contributory negligence having been committed by the plaintiff. We were of the considered view that the loss suffered by the plaintiff in this case had been caused solely by the negligence of the said law firm, which had rendered the prior approval of Loh's loan application by the plaintiff wholly irrelevant. It had also been occasioned, as well as a direct result of the E failure on the part of the law firm to properly discharge its contractual obligations pertaining to the obtaining of verification and confirmation of the particulars pertaining to the property from the developer.

[37] If we were to revert back to what was adverted to by Lord Hope in the F case of *Chester v Afshar* it would be clear to see that the duty on the law firm to properly discharge its obligation to obtain the required verification and confirmation by liaising directly with the housing developer was intimately related to the loss that was suffered by the plaintiff. To put it the other way, the loss suffered was intimately involved with the beach of duty on the part of the G said law firm to properly obtain the verification of the particulars as required by the plaintiff, directly from the developer. As could be vividly recalled, the evidence had shown that the law firm had failed to discharge that duty as expected of the required standard of a solicitor, in the circumstances of this case. By providing the plaintiff with the false or inaccurate information H pertaining to the status of the subject property vis a vis the fourth defendant, the plaintiff was effectively denied the fair chance of properly evaluating the risk involved in the release of the loan monies to the fourth defendant. The plaintiff had in fact released the monies to the fourth defendant without any I valid and lawful security to fall back onto, if Loh Yoke Pah were to default in the repayment of the loan facility. That decision by the plaintiff was the very product of the advice given by the law firm. The proximity between the breach of the duty incumbent on the law firm and the plaintiff's doomed decision to release the loan monies to the fourth defendant in the sum of RM680,000

could not have been more intimate. As such, but for the negligence of the law firm, the bank would not have suffered the loss that it had suffered. That negligence attributable to the law firm must be total, namely it was 100% liable for the loss suffered by the plaintiff. In the case of *Lim Soh Wah v Wong Sin Chong* [2001] 2 CLJ 344, the Court of Appeal held as follows at p 347:

> A plaintiff may suffer damage. But it is of no consequence unless the defendant negligently caused it. If the damage would have happened anyway, then the defendant cannot be held liable for it. For liability to be visited upon a defendant's head, it must be proved that but for his negligence the harm would not have happened, see *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068.

[38] We were satisfied that the plaintiff had established the negligence on the part of the law firm in this case.

[39] Premised on the above considerations, we were of the considered view that the learned trial judge was in error when he found the plaintiff to have contributed to the loss it had suffered. With respect, we could not find any valid basis which could possibly justify a finding of any contributory negligence against the plaintiff.

[40] In essence, the effect of our decision would be that we were varying the decision of the learned High Court judge in that we found that the law firm was 100% liable for the losses suffered by the plaintiff, whereby through its negligence, the operation of cl 15 of the letter of advice from the law firm to release the loan facility, had been triggered. It was recalled that the said cl 15 stipulated that the law firm had agreed to indemnify the plaintiff in full in the event, among others, that it was found to be negligent. Indeed, we found the law firm to be 100% negligent.

[41] We also found that the learned High Court judge had erred in applying the 'But for test' against the plaintiff and thereby finding the bank to be contributorily negligent to the extent of 30% liability. We agreed with the submission of the plaintiff's learned counsel that the plaintiff's loss was directly and proximately caused by acts and/or omission, of the law firm, in not confirming *directly* with the developer as to whether the property was in fact beneficially owned by the fourth defendant. That was exactly the mandate given to the said law firm by the plaintiff. But, as was rightly found by the learned trial judge, that was exactly what was *not* done by the said law firm.

[42] We also agreed that the negligence on the part of the plaintiff in approving the loan to Loh Yoke Pah was entirely irrelevant to the issue of whether the said law firm had discharged their contractual obligation to bank to secure a valid and legal assignment over the property. As such, we found that

the said law firm was 100% liable for the losses suffered by the plaintiff.

[43] In the circumstances, his findings in those regards could not be sustained in law. Our appellate intervention was therefore necessary to right what in our considered view, was a wrong.

[44] In the upshot, we had therefore dismissed the appeal by the law firm and we had allowed the cross-appeal of the plaintiff. Having heard parties on the matter of costs, we had ordered the said law firm to pay costs of RM30,000 to the plaintiff. Deposit was ordered to be refunded to the law firm, being the appellant herein.

[45] We had ordered accordingly.

Appellants' appeal dismissed; respondent's cross-appeal allowed with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar